No. 20390

In the

United States Court of Appeals

For the Ninth Circuit

A. Bates Butler, as Trustee of Construction Materials Co.,

Appellant,

vs.

City of Tucson, et al.,

Appellees.

Martin Construction Co. and Pacific National Insurance Co.,

Appellants,

vs.

Bank of Tucson, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Arizona

Reply Brief on Cross-Appeal of Appellees Pacific National Insurance Company and Martin Construction Company

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No. 20390

In the

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MARTIN CONSTRUCTION CO. and PACIFIC NATIONAL INSURANCE CO.,

Appellants,

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ARGUMENT

While Bank has elected to open its argument in answering Martin and Pacific's opening brief on cross-appeal with a

discussion of issues which were not tried, and with a quotation from an exhibit which was marked for identification but never admitted in evidence, the issue on this cross-appeal ultimately resolves into whether the rule of *Adamson v. Paonessa,* 180 Cal. 157, 179 Pac. 880 (1919), is to prevail over the line of authorities beginning with *Prairie State Nat. Bank v. United States,* 164 U.S. 227, 41 L.ed. 412, 17 S. Ct. 142 (1896), as reaffirmed and extended in *Pearlman v. Reliance Ins. Co.,* 371 U.S. 132, 9 L.ed. 2d 190, 83 S.Ct. 232 (1962).

On the other hand, Bank suggests in its Supplemental Statement of Case that "issues as between Bank and Pacific were severed for later trial." As the record will reflect, Bank's cross-claim again Pacific was severed and reserved for separate trial in the event that Pacific or Martin were to succeed on their cross-appeal. Conflicting claims of Bank and Pacific to the improvement district bonds which were the subject of Count III of the Complaint, however, obviously were tried below and are the subject of this cross-appeal.

Adamson distinguished *Prairie State* because in the latter case there was a fund which was in effect reserved for the benefit of materialmen and laborers whom the contractor might fail to pay. The distinction seems artificial where, as here, the contract provides for *no* payment until the contractor has turned over the work, "complete and ready for use free and discharged of all claims and demands whatsoever, for or on account of any and all labor and materials used or furnished to be used" in the improvements, and the improvement district bonds had not been issued at the inception of the litigation. Bank as assignee of the contractor's rights had full notice of the limitations on those rights

expressed in the contract, and thus can stand in no better position than its assignor.

Bank also contends that Martin and Pacific are precluded from complaining that Martin's claim was not paid because they failed to file written objections under a statute (A.R.S. Sec. 9-687 F.) which by its terms is limited in effect to "errors, informalities and irregularities which the governing body might have remedied or avoided at any time during the progress of the proceedings." Construction's failure to pay Martin clearly was not such an error, informality or irregularity, and was subject to remedy or avoidance at any time up to and including the issuance of the improvement bonds and their delivery on November 20, 1964, to the Clerk of the District Court. It is stipulated that City received Martin's verified claim on January 3, 1964, and that the resolution providing for issuance of the improvement bonds was adopted subsequently on January 20, 1964.

It is axiomatic that a contract must be construed so as to give meaning to all the words and clauses used by the parties. *Doran v. Oasis Printing House*, 24 Ariz. 475, 211 Pac. 562 (1922). The court in construing a contract should give some effect to every part thereof, if possible. *Aldous v. Intermountain Bldg. and Loan Ass'n of Ariz.*, 36 Ariz. 225, 284 Pac. 353 (1930). To hold that Bank as assignee of Construction was entitled to payment of the as yet unissued and undelivered improvement district bonds prior to the discharge of Martin's claim for labor and materials is to render meaningless the clear and unequivocal language of the contract requiring Construction to turn over the work free and discharged of such claim prior to payment. The rule of *Pearlman v. Reliance Ins. Co., supra*, should be ap-

plied, and the judgment reversed insofar as it subjugates Martin's rights to those of Bank.

Respectfully submitted,

CHANDLER, TULLAR, UDALL & RICHMOND

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Attorneys for Appellees
Pacific National Insurance Company
and Martin Construction Company

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES L. RICHMOND